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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

MITCHELL, GUY, et al.,

Petitioners,

- against -

HELMS, MARY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

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INTEREST OF AMICI CURIAE

Two federally funded programs administered by the Board of Education of the City of New York could be affected by the Court's decision in this case: Title VI (formerly Chapter II, and the program directly involved herein) and Title III, a two-year old program entitled the

Technology Literacy Challenge Act, the purpose of which is to put every school on the "information superhighway." Both provide money for instructional material and equipment, and in Title III for staff development as well. The grants are intended to enhance the education of all students, whether in public or private schools. The funds are funneled through the state to the local level - in the case of New York City, to the Board of Education. In both programs, the material is provided to the students, and it is "on loan," but kept permanently in the school. No money is ever given directly to the private school. Instead, the school receives the instructional material or equipment from a vendor approved or supplied by the Board, and payment is made by the Board to the vendor. In both Titles, the private schools participating are advised that they may not use the material for religious purposes.

SUMMARY OF ARGUMENT

The program at issue herein fully meets the test for Establishment Clause constitutionality as taught by the recent jurisprudence of this Court. The program has a secular purpose of providing educational opportunities to all children in the state. Its principal effect is the advancement of education because the benefits are provided on a neutral basis and are provided to the students rather than to the sectarian schools. The provision of library books, instructional materials and equipment, which was held unconstitutional in Meek and Wolman, is permitted here because the facts are distinguishable from the facts in those cases and because, under recent holdings of this Court in Zobrest, Witters, Bowen, and Agostini, those cases are no longer good law. They should be overruled.

ARGUMENT

THE STATE-FUNDED SOFTWARE AND LIBRARY MATERIAL LOAN PROGRAMS TO PAROCHIAL SCHOOL STUDENTS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE EITHER FACIALLY OR AS APPLIED BY THE LOCAL SCHOOL DISTRICT.

In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), this Court held that, in order to comply with the Establishment Clause, a statute must first "have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." (citations and quotation marks omitted). In its most recent ruling in this area, the Court continues to apply this test. It has, however, been modified insofar as entanglement is now treated as part of the Court's evaluation of the statute's primary effect. Agostini v. Felton, ___ U.S. ___, 117 S.Ct. 1997, 2014-15 (1997). The state statutes here, both facially and as administered by the Jefferson Parish School Board, fully meet this test.

A. The Statutes Have a Secular Legislative Purpose.

It is clear from the text of the statutes at issue here that their intent is to benefit the educational opportunities of all children attending school in the state, whatever the type of school: public or private, parochial or non-denominational. Nor was this an issue below. The statutes, therefore, have a secular purpose and only a secular purpose.

B. The Principal Effect of the Program is the Advancement of Education, Not Religion.

1. The Benefits are Provided on a Neutral Basis to a Broadly-Defined Class of Recipients.

The principle of neutrality has been of central significance in recent Supreme Court decisions regarding the Establishment Clause. As the Court stated in Rosenberger v. Rector, 515 U.S. 819 (1995), a "general principle" in "upholding government programs in the face of Establishment Clause attack is their neutrality toward religion .... We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." 515 U.S., at 839.

Utilizing this principle in Rosenberger, the Court found constitutional the provision of funds by a state university to pay the printing costs of a student newspaper with the avowed mission of espousing a Christian point of view. Vital to the Court's decision was its finding that the purpose of the university's funding program was to "support a broad range of extracurricular student activities ... related to the educational purpose of the University." 515 U.S., at 824. Noting that the student publication at issue was only one of fifteen student publications funded that year, the Court concluded (515 U.S., at 840):

> The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion

> or adopted some ingenious device with the purpose of aiding a religious cause.

The same reasoning was applied in Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), where the Court upheld a public school district's provision of a sign language interpreter to assist a deaf student's instruction at a sectarian high school. The interpreter's services were requested by the student's parents pursuant to the Individuals with Disabilities Education Act ("IDEA"), which the Court described as "a general governmental program that distributes benefits neutrally to any child qualified as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." 509 U.S., at 10. Because these benefits were, moreover, available to the student at whatever school his parents chose, the IDEA created no financial incentive for his parents to choose a parochial school. Id. Accordingly, the Court ruled in favor of the aid, stating (509 U.S., at 8):

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

In Agostini v. Felton, __ U.S. ___, 117 S.Ct. 1997 (1997), the Court again reaffirmed this principle. It held that the provision by New York City of Title I remedial educational services to parochial school students on parochial school premises created no financial incentive for

parents to choose a parochial school and did not have the effect of advancing religion, where *"the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."* 117 S.Ct., at 2014 (emphasis added). The Agostini decision noted that in the two 1985 decisions it was reversing, the neutrality consideration had been given no weight. Agostini also referred to decisions issued before those two 1985 decisions, in which the Court had sustained educational programs on the basis that they neutrally aided all children, whatever the nature of their school. Id. Among the earlier decisions the Agostini Court cited with approval was Board of Education v. Allen, 392 U.S. 236 (1968), in which the Court upheld New York State's program of loaning textbooks to parochial as well as public school students, finding that it "merely makes available to all children the benefits of a general program." 392 U.S., at 243.

There can be no dispute that the programs at issue here are neutral toward religion. The software and library materials are available on an equitable basis to all students attending grades K-12 in any school in the school district, public or private, secular or sectarian. The choice of school is made by the student or his parents; since the software and library loan programs are available whatever the choice of school, as in Agostini, the student has no incentive to attend a parochial rather than a public or a secular private school. The neutrality of the programs and the relatively minor participation of parochial school students in these programs is clear from the allocation of funds to public and private school students by the Jefferson Parish School Board. Thus, by far the greatest part of state

funding to the JPSB has been for loans of these materials to students attending public schools.

2. The Benefits are Provided to Students, not to Sectarian Schools.

A second dominant theme in cases in which the Supreme Court has approved the provision of services and materials to parochial school students has been its conclusion that the benefits have gone to the students, as distinguished from the provision of money or direct aid to the parochial school. See, e.g., Agostini, 117 S.Ct., at 2013 (Title I funds provided to local school board which provides services to students; "no Title I funds ever reach the coffers of religious schools"); Rosenberger, 515 U.S., at 841 (Christian student publication receives printing services from third-party contractor; contractor is reimbursed by the public university); Zobrest, 509 U.S., at 12 (program in which deaf child receives aid of interpreter is one where "disabled children, not sectarian schools, are the primary beneficiaries of the IDEA"); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 487 (1986) (tuition paid to student, who then transmits it to educational institution of his choice); Allen, 392 U.S., at 243-44 (textbooks furnished to pupils, but ownership remains with the state).

Every facet of the procedures utilized in the software, library materials and equipment loan programs, as provided by the state regulations and administered by the JPSB, demonstrates that the benefits here go to the students. No money is paid by the JPSB to the private school. Although the software, library materials and equipment are permitted to remain on the private school premises, each

library book is stamped as the property of the JPSB, and the JPSB retains title to all the books, materials and equipment.

It is noteworthy that almost this precise same procedure was specifically approved as constitutional in Allen (392 U.S., at 244, n.6):

> While the record and the state court opinions in this case contained no information about how the books are in fact transferred from the Boards of Education to individual students, both parties suggested in their briefs and on oral argument before this Court that New York permits private schools to submit to boards of education summaries of the requests for textbooks filed by individual students, and also permits private schools to store on their premises the textbooks being loaned by the Board of Education to the students. .... For purposes of this case we consider the New York statute to permit these procedures. *So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request.*

(emphasis added).[1] Equally, the programs here must be

[1] As Agostini instructs, it is not fatal that the materials are loaned without the individual applications of students. 117 S.Ct., at 2012. Similarly, whether the instructional material is provided to each student individually or to (continued...)

found to provide their benefits for the use of the individual students.

3. The Provision of the Instructional Material Here is Not Constitutionally Prohibited.

The Court of Appeals held that the provision of the instructional material here violates the teachings of Meek and Wolman. The Court viewed the decisions in Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), as absolute bars to any program providing any instructional material other than textbooks to parochial school students, no matter how that program is structured. In doing so, it misinterpreted the application of both Meek and Wolman to the facts in this action. Moreover, this Court's decisions since 1992, notably Agostini, have changed this law significantly. See, Agostini, 117 S.Ct., at 2017, and cases cited therein.

a. The law has evolved.

In Meek, $12 million of instructional material was annually loaned by the State directly to nonpublic schools only, of which over 75% were church - or religiously - affiliated. 421 U.S., at 362-65. This Court endorsed the District Court's ruling that the materials to be loaned, which included "secular, neutral, non-ideological" books, periodicals, photographs, musical scores, maps, globes, films, recordings, slides, and videotapes (421 U.S., at 355, n.4) were "self-polic[ing], in that starting as secular,

[1] (...continued)
several students at once has no constitutional significance. Id.

nonideological and neutral, they will not change in use." 421 U.S., at 365, quoting from 374 F. Supp. 639, 660 (1974).[2] Thus, the divertibility of the instructional material was not an issue in Meek, since the Court assumed the material was, at least "ostensibly," not divertible. The Court nonetheless concluded that channeling "substantial" aid to the secular educational functions of a predominantly religious institution "inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion." 421 U.S., at 366 (citation omitted). The Court, however, upheld the state's provision of textbooks to private school children, as indistinguishable from the statutory provision in Allen. 421 U.S., at 359-62.

In Wolman, the instructional material, including tape recorders, maps and globes, and science kits, was again wholly provided to students attending nonpublic schools. 433 U.S., at 250. Over 96% of such students attended sectarian schools. 433 U.S., at 234. Because the parties had stipulated that only materials which could not be diverted to a religious use would be supplied, the lower court had ruled in favor of the statute. 433 U.S., at 240. Although this Court did not make a finding that any such diversion had in fact occurred, it nonetheless concluded that, as in Meek, "in view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." 433 U.S., at 250. The Court conceded

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[2] The instructional material in Meek is defined as nearly identical to the library material which is the subject of the loan program here. Compare 421 U.S., at 355, n. 4 with Helms v. Picard, 151 F.3d 347, 367-68 (5th Cir. 1998).

there was a "tension" between its ruling (and also that of Meek) prohibiting instructional material, and the Court's approval of the textbook loans in Allen. Without further explaining the reason for the difference between these two rulings, it declined to "extend [the] presumption of neutrality" granted textbooks in Allen "to cover all items similar to textbooks." 433 U.S., at 251-52, n. 18. It did, however, rule that the Establishment Clause permitted the provision of standardized tests on secular subjects to nonpublic schools, on the basis that since the nonpublic schools controlled neither the tests' content nor their scoring, the possibility of "the use of the test as a part of religious teaching" was averted. 433 U.S., at 238-41. The Court again approved textbook loans. 433 U.S., at 238.

In both Meek and Wolman, an underlying concern of the Court, in contrast to its position in Allen[3], was its belief that it could not "rely ... entirely on the good faith and professionalism of the secular teachers ... functioning in church-related schools to ensure that a strictly non-ideological posture is maintained." Meek, 421 U.S., at 369; accord, Wolman, 433 U.S., at 253-54. Monitoring by the state would be required to be certain religion did not influence the teachers' use of the publicly-funded benefits,

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[3] In Allen, the Court, in approving the textbook loan, assumed that, absent evidence to the contrary, it could rely upon the good sense and honesty of the school authorities to be able to distinguish secular books from religious ones, and to only supply to the private school students those books whose content was suitable. Allen, 392 U.S., at 244-245.

and this in turn would result in constitutionally prohibited entanglement. 421 U.S., at 370; 433 U.S., at 254.

The facts in Meek and Wolman are distinguishable from those here in two major respects. In the JPSB programs, software and library material and equipment loans are supplied to students who attend both public and private schools. In Jefferson Parish, approximately 70% of the funds are used for material loaned to public school students, and only 30% for material loaned to nonpublic school students, some of whom attend sectarian schools. In contrast, in Meek, the material was given to private schools, 75% of which were sectarian, and in Wolman, the material was given to private school students, of whom 96% attended sectarian schools. Thus, two key requirements of the Court's recent rulings finding no violation of the Establishment Clause - neutrality and benefit to students - are satisfied here as they were not in Meek and Wolman.

In addition, the rulings in Meek and Wolman were never as broad or clear-cut as the Court appears to assert. In Wolman itself, the finding that the Establishment Clause is not violated by the provision of state-prepared and scored secular tests undercuts any view that either Meek or Wolman stands for an absolute prohibition on instructional material other than textbooks. Three years after Wolman, the Court made this explicit. In Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), the Court held constitutional New York State's reimbursement of the nonpublic schools' costs of administering and grading state-prepared and mandated tests. In going beyond Meek and Wolman, both in permitting parochial school teachers to grade the tests and

in making payment directly to the schools, the Court stated (444 U.S., at 646-47):

> It is urged that the District Court judgment is insupportable under *Meek*, which is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities. The difficulty with this position is that a majority of the Court, including the author of *Meek v. Pittenger*, upheld in *Wolman* a state statute under which the State, by preparing and grading tests in secular subjects, relieved sectarian schools of the cost of these functions, functions that they otherwise would have had to perform themselves and that were intimately connected with the educational processes. Yet the *Wolman* opinion at no point suggested that this holding was inconsistent with the decision in *Meek*. Unless the majority in *Wolman* was silently disavowing *Meek*, in whole or in part, that case was simply not understood by this Court to stand for the broad proposition urged by appellants and espoused by the District Court.

That *Meek* was understood more narrowly was suggested by MR. JUSTICE POWELL in his separate opinion in *Wolman*: "I am not persuaded," he said, "nor did

> *Meek* hold, that all loans of secular instructional material and equipment" inescapably have the effect of direct advancement of religion. 433 U.S., at 263. And obviously the testing services furnished by the State in *Wolman* were approved on the premise that those services did not and could not have the primary effect of advancing the sectarian aims of the nonpublic schools.

(citations omitted).

In 1995, the Ninth Circuit reexamined this Court's holdings in Allen, Meek, Wolman, and Regan, in light of the Court's more recent rulings emphasizing neutrality, such as Zobrest. It concluded that the determinations in Wolman and Regan permitting uniform tests to be given to parochial schools made "constitutionally suspect" any bright-line distinction between textbooks and other instructional material. Walker v. San Francisco Unified School Dist., 46 F.3d 1449, 1465-66 (9th Cir.), reh. denied, 62 F.3d 300 (9th Cir. 1995). Rather, the Ninth Circuit evaluated the San Francisco school district's Chapter 2 program, which provided "instructional and educational material [such as] library books, reference material, [and] computer software and hardware for instructional use" - material very similar to that challenged here - under what it concluded was the "underlying principle animating Establishment Clause jurisprudence: government neutrality toward religion." 46 F.3d, at 1454, 1466.

In concluding that the effect of the San Francisco program neither advanced nor inhibited religion, Walker emphasized that, unlike Meek and Wolman, 75% of

Chapter 2 funding went to public school students; the amount of funding was a de minimus $6.65 per student, which was clearly supplementary to the basic educational services of the parochial schools; and the controls instituted by San Francisco prevented the instructional materials from being diverted to religious teaching. 46 F.3d, at 1467. Those controls included prescreening, retaining title in the school district, and the parochial schools' pledge not to use the material provided to their students for religious purposes. Id. Finally, the Walker Court found it significant that there was no reported instance in which the Chapter 2 materials had been actually misused. 46 F.3d, at 1468. It concluded that "[u]nder these circumstances preventing parochial schools from participating in the generally available Chapter 2 program, based solely on *the mere possibility* that Chapter 2 benefits will be diverted, would unfairly discriminate against religion." 46 F.3d, at 1468 (emphasis added).

The correctness of the Ninth Circuit's decision is underscored by this Court's most recent decision regarding the Establishment Clause. In Agostini v. Felton, supra, ___ U.S. ___, 117 S.Ct. 1997 (1997), this Court not only overruled its holding in Aguilar v. Felton, 473 U.S. 402 (1985), but also reexamined and overruled portions of the companion case to Aguilar, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). Ball had ruled unconstitutional a program called Shared Time, which provided remedial and enrichment mathematics, reading, art, music and physical education instruction to nonpublic school students during the school day on the nonpublic school premises. The public schools supplied both the teachers and all supplies and instructional material for these classes. Ball, 473 U.S., at 375-376. Agostini summarized

the basis for Ball's rejection of this program (117 S.Ct., at 2010):

> Distilled to essentials, the Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

In Agostini, the Court concluded that more recent cases had undermined all four assumptions, and that the portion of Ball addressing the Shared Time program was "no longer good law." 117 S.Ct., at 2016.

First, Agostini stated that in cases since Ball, the Court had "abandoned the assumption that properly

instructed public school employees [on parochial school grounds] will fail to discharge their duties faithfully" (117 S.Ct., at 2016), specifically attributing this former presumption to Meek as well as to Ball. 117 S.Ct., at 2010. It found especially notable Ball's failure to take into account the absence of any showing that religious indoctrination had actually occurred in the Shared Time program. 117 S. Ct., at 2008-09. Second, Agostini stated that the Court had now "departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid." 117 S. Ct., at 2011. Ball, in reaching this conclusion, had relied extensively on both Meek and Wolman.[4] Finally, Agostini concluded that since there was no longer a presumption that teachers on sectarian school premises would inculcate religion merely because of their surroundings, there was no need for monitoring by the school district and no entanglement problem. 117 S. Ct., at 2015-16.

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[4] The Court in Ball stated: "In Meek and Wolman, we held unconstitutional state programs providing for loans of instructional...materials to religious schools, on the ground that the programs advanced the 'primary, religion-oriented educational function of the sectarian school.' ... The programs challenged here, which provide teachers in addition to the instructional... materials, have a similar - and forbidden - effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause." 473 U.S., at 395 (additional citations to Meek and Wolman omitted).

Agostini, in overruling portions of Ball, has also clearly rejected its underpinnings in both Meek and Wolman. The assumption in both of those cases that educators cannot be trusted to follow instructions not to divert secular material to a religious use must be cast aside. Equally, the rule that the provision of instructional material to parochial schools is direct aid and necessarily invalid, is no longer a constraint.

We submit that holdings and reasoning in Meek and Wolman are no longer viable in light of the subsequent jurisprudence of this Court and should be overruled.

4. The Programs Create No Excessive Entanglement.

The state programs necessitate only a limited degree of administrative cooperation between the school districts and the parochial schools. Necessarily, the school district must advise the private as well as the public schools of ordering procedures, and program criteria and restrictions. The district must obtain, review, and notify vendors to fill the private school orders for software and library materials. These arrangements are limited and ministerial. The state statutes require limited monitoring by public employees of the private schools' actual use of the loaned material. Helms v. Picard, supra, 151 F.3d, at 368.

As Agostini advises, "Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable." 117 S. Ct., at 2015. Administrative cooperation of the type which occurs here does not create any excessive entanglement. Id. The procedures are no different than those approved in Allen.

C. The Court of Appeals Failed to Consider the Recent Jurisprudence of this Court Regarding the Establishment Clause.

The Court of Appeals held that this Court's position, unaltered since the mid-1970's, is that textbooks are permissible indirect aid flowing to individual students as held in Allen, but all other instructional material constitutes prohibited aid to sectarian schools as allegedly held in Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977), because of the character of the aid at issue. Helms v. Picard, supra, 151 F.2d, at 372. The Court of Appeals' reliance on the twenty-plus-year-old cases of Meek and Wolman is misplaced, because it ignores the central principle enunciated in this Court's more recent cases that benefits extended neutrally to a broad range of recipients - including religiously-affiliated recipients - do not violate the Establishment Clause. In these more recent cases, the Court advises that two factors are determinative to such a finding: first, the government benefits are provided to a broad class of recipients; and second, the benefits are available as a result of the numerous private choices of individuals. Zobrest v. Catalina Foothills School District, 509 U.S. 1, 8-9 (1993) (discussing the underlying premise for the Court's decisions in Mueller v. Allen, 463 U.S. 388 [1983], and Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 [1986]).

In Witters, the Court upheld a State of Washington program providing vocational assistance to visually handicapped students. The lower courts had denied the funds to petitioner, a blind person studying to become a pastor or missionary at a private Christian college, on the ground that this grant of aid had the primary effect of

advancing religion. 474 U.S., at 483-85. This Court reversed, finding the aid was "available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited" and that "any aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S., at 487.

In Mueller v. Allen, supra, 463 U.S. 388, this Court ruled there was no violation of the Establishment Clause in a Minnesota program allowing parents to deduct from their state income taxes their children's school expenses for tuition, textbooks and transportation, even though a statistical analysis indicated that the vast majority of deductions went to parents of children attending parochial schools. Mueller, 463 U.S., at 400-401; see Zobrest, 509 U.S., at 9. Sufficient for the Court was the fact that the statute was "facially neutral" (463 U.S., at 401), and that, insofar as aid went to parochial schools, it did so "only as a result of decisions of individual parents" to send their children to those schools. 463 U.S., at 399.

In Bowen v. Kendrick, 487 U.S. 589 (1988), the Court went further and held constitutional a federal act granting funds to private agencies to provide social services related to adolescent sexuality and pregnancy. The statutes creating the act expressly mentioned the role of religious organizations as grantees. 487 U.S., at 606. A number of grantees were in fact religious organizations. 487 U.S., at 610, n.12. Under the act, these organizations were permitted to provide counseling to adolescents on sexuality and pregnancy (487 U.S., at 605) - subjects on which the Court recognized many religions have strongly-held views. Nonetheless, the Court concluded that the participation of

religious institutions in the program did not violate the Establishment Clause, because "a fairly wide spectrum of organizations is eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." 487 U.S., at 608.

This Court's recent citations of Everson v. Board of Education, 330 U.S. 1 (1947), and Board of Education v. Allen, supra, 392 U.S. 236 (1968), two cases, which were seminal to the distinction between direct and indirect aid, an important factor at that time for determining constitutionality, highlight the change of emphasis in analyzing Establishment cases. In both Mueller and Bowen, the Court cited to Everson and Allen as precedent for its decisions, but it did not refer to them in the context of direct/indirect aid. Rather, it distinguished the aid permitted in Everson and Allen as predicated on a finding of neutrality, in which the Establishment Clause was found not to be violated because "the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." Mueller, 463 U.S., at 398 (internal citation omitted, emphasis in original); Bowen, 487 U.S., at 608. Agostini, however, appears to discard outright the direct/indirect analysis. In Agostini, the Court overruled as "inconsistent with our more recent decisions" (117 S.Ct., at 2016) two of its own former decisions: Aguilar v. Felton, 473 U.S. 402 (1985) and portions of School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). In Ball, the Court had concluded that Grand Rapids' Shared Time program had the "forbidden effect of advancing religion." 473 U.S., at 395. In Agostini, the Court summarized Ball's reasoning as having:

> separated prior [Supreme Court] decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was "indirect, remote or incidental" (and upheld the aid); and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise" (and invalidated the aid).

117 S. Ct., at 2009. Explicitly relying on Meek and Wolman, the Ball Court had, therefore, concluded that "Grand Rapids' program fell into the latter category." Id.

In Agostini, Justice O'Connor stated, "[W]e have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid." 117 S.Ct., at 2011. Instead, the Agostini Court concluded that "under current law, the Shared Time program in Ball ... will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination." 117 S.Ct., at 2012.

The library materials and software loan programs, available to students in public and nonpublic schools, including students in sectarian schools, as a result of parents' choices to send their children to those schools, conform to this Court's neutrality principle presently governing aid to education.

CONCLUSION

Recent Supreme Court Establishment Clause cases have held that programs such as the one at issue here pass constitutional muster as long as they are neutral, the benefits are directed to students, and there is no excessive entanglement. The judgment of the Fifth Circuit Court of Appeals should, therefore, be reversed and, to the extent that the Meek and Wolman decisions need to be overruled to reverse the judgment, they should be explicitly overruled.

Respectfully submitted,

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